APPEAL NO. 990364

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 18, 1998. The issues at the CCH were whether the appellant, who is the claimant, sustained a compensable injury on _____, and whether he had the inability to obtain and retain employment equivalent to his preinjury wage (had disability) as a result of the compensable injury.

The hearing officer determined that the claimant did not sustain a compensable injury, and therefore his inability to work did not amount to "disability."

The claimant has appealed the decision. First of all, he appeals the finding, based on stipulation, that venue was proper in the (city 1) field office, and generally asserts that neither the 1989 Act nor OSHA standards were followed. He argues that he was injured as he stated, according to applicable definitions in the 1989 Act and according to the medical evidence. He argues that he attempted to return to work and was not allowed to do so, but is physically unable to return to work. He argues that he was not allowed to have witnesses, that information was not shared with him by the respondent (carrier), and that the Texas Workers' Compensation Commission did a poor job performing its duties. He questions why the employer has not been investigated. The carrier responds that the hearing officer's decision is supported by the record of the case, including medical records. On the matter of disability, the carrier asserts that the claimant contended at the CCH that he was not pursuing income benefits, but that the hearing officer's decision is correct due to the finding that there was no compensable injury.

DECISION

Affirmed.

The claimant, a gentleman in his mid 50s in age, was employed by (employer) as a millwright worker. He said, generally, that this job entailed a lot of pushing, pulling, lifting, drilling, use of tools, and physical labor. He said that there was also a lot of stooping and bending. The weight which he could be called upon to lift could be as heavy as 125 pounds; however, he said he would not be required to lift this amount overhead. The claimant said that near the end of his workday, on _____, he felt a sharp burning sensation on his left heel, which he reported to his supervisor. He said his supervisor suggested he might have a nail in his boot. Claimant went home that evening after finishing his work; next morning, he had changed his boots but still had pain. The claimant said he was lifting pieces of plywood out in front of him which caused his fingers to get numb after about three hours. He went to the first aid station for treatment. The claimant agreed on cross-examination that he told the medic at first aid that he did not think his problems were work related. The evidence indicated that the employer was investigating claimant's tingling fingers as work related at least by February 22, 1996, and that the claimant contended this occurred because he was looking up while doing overhead work.

The claimant said he had trouble getting out of bed the next day, and had completely numb fingers along with intense back pain. Claimant said he was sent by the employer to Dr. S. Claimant's own treating doctor was Dr. M, and his assistant, Dr. C. Claimant said regular health insurance paid for their treatment, until after claimant was terminated in March 1997.

Claimant said at first he was released to work and not allowed to return, but then stated that he did return for 60 days until he was not able to continue because his legs and toes "went out." He said he staggered as a result and was reported as being drunk at work. Claimant said he was currently without income except for food stamps, but was only seeking medical benefits, because his treatment was being paid only through county indigent care. A letter that the claimant wrote on December 6, 1997, to his employer states that he was a full-time student at a local college. It appears that the claimant was put on a leave of absence through June 1, 1997, and it was not extended, and that claimant could no longer participate in medical insurance benefits.

Claimant agreed that he did not originally think of his injuries as work related, because he did not realize that such injuries could occur through ways other than a specific accident. He said he felt his injuries were caused by a number of things, including a time when he did not believe he had adequate assistance from a helper. He said being required to work while holding his head straight and not turning it also contributed.

Claimant had a preemployment physical which noted no problems. Much of the evidence presented by the claimant consisted of written statements documenting the progress of his pain, his disputes with his employer, and a complaint apparently filed against a doctor who treated him. The medical evidence in the file includes a report from Dr. CM, who stated that claimant's MRI of October 24, 1997, was positive for spondylosis and stenosis. He had carpal tunnel release surgery on July 6, 1996, according to Dr. CM. Dr. CM considered claimant's complaints, and then stated that he saw no evidence that claimant's right carpal tunnel syndrome, or his cervical and lumbar degenerative conditions, were causally related to the "compensable event." He stated that the claimant's back condition was a disease of daily living.

Dr. T wrote a report on June 28, 1996, to Dr. M, opining that claimant's foot and toe symptoms were suggestive of peripheral neuropathy rather than radicular pain. He noted that an EMG exam did not show clear evidence for neuropathy. Dr. T wrote a letter to claimant on October 14, 1998, which responds to a concern claimant had about another medical report. Dr. T apparently supports the disputed report, noting that claimant told him independently that he had low back pain for several years. Claimant disagreed with this characterization. The reports from Dr. G, who performed the claimant's carpal tunnel release surgery, do not comment one way or the other as to Dr. G's opinion on the likely cause. He recites claimant's contention that he developed such conditions from "looking up" at work.

Dr. M wrote on August 31, 1998, that he had seen claimant for two visits in 1996 that appeared to be workers' compensation injuries, because of the recited history that claimant

did not have significant back pain until he did some work over his head at the job site. Earlier MRIs that Dr. M ordered on February 19, 1996, showed no herniation, and were consistent with spondylosis and stenosis; when later compared to the October 1997 MRIs, no change was observed. Dr. S examined the claimant at Dr. M's request on February 19, 1996, and stated his opinion that the conditions he observed in claimant had been there for some time, and were not the result of a work-related incident. Dr. S said his work-related activities could have aggravated his condition.

We will first note that the claimant contends that various procedural irregularities occurred. According to the record, both parties agreed that the (city 1) field office was the proper field office to conduct the CCH. The hearing should be conducted at a site within 75 miles from a claimant's residence at the time of the injury, Section 410.005, and there was no assertion and no evidence that this was not the case. We cannot, therefore, reopen this stipulation on appeal. Second, all of the claimant's exhibits were admitted and there was no argument raised that some information existed which had not been disclosed by the carrier. The claimant was not prevented from presenting any additional witnesses, but none were presented by him. Finally, we cannot agree, based upon our review of the record, that the claimant was not assisted adequately in presenting his case. Whether there is (or should be) any administrative violation matter pending is not a matter for consideration by the hearing officer, whose job it is to resolve income benefit disputes, but is within the responsibility of the Compliance and Practices Division. The relevance of any OSHA or OSHCON guidelines to the dispute was not asserted and we would only respond that the 1989 Act governs the entitlement to, and amounts of, benefits under the act as well as the definition of "compensable injury" for purposes of determining such entitlement. We find no error based on the technical points raised on appeal.

Claimant's theory of recovery, in the absence of a single incident to which he could point, was that he had an occupational disease through the array of tasks that he did. The definition of occupational disease set out in Section 401.011(34) states that it "does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(36) defines repetitive trauma injury as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." To recover for an occupational disease of this type, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d

701 (Tex. Civ. App.-Amarillo 1974, no writ). The medical evidence in this case was clearly conflicting, and the claimant, while alluding to various activities that comprised heavier physical labor, did not identify work that was repetitious or traumatic. The objective testing indicates essentially a degenerative condition, with varying medical opinion as to whether this was work related. As we review the record, we find sufficient evidence to support the hearing officer's decision, and cannot agree that it is against the great weight and preponderance of the evidence. We therefore affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge